Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ANTHONY CICCONE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Hobbs Act defines "extortion" as the "obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951(b)(2). In *Scheidler v. National Organization for Women, Inc.*, 537 U.S. 393 (2003), this Court held that extortion must involve actual "obtaining of property," rejecting lesser definitions of coercion, regulation, or frustration of property interests. This Court considered but left for another day the companion question of the line between liberty and property interests under the Hobbs Act, and whether and to what extent intangible interests such as control over assets qualify as property under the Act. *Id.* at 401 & n.5.

1. Whether the Second Circuit, in addressing the question left open in *Scheidler*, correctly held that intangible property interests, in particular, the rights of union members to free speech, democratic participation and disinterested union representation, constitute "property" under the Hobbs Act, and if so, whether such rights are "obtainable." The decision below stands in conflict with this Court and several courts of appeal concerning the meaning of "property" under federal law, and in conflict with *Scheidler* over the "obtaining" requirement and the propriety of "expansive" construction of the Hobbs Act.

2. Whether the Second Circuit, in conflict with several circuits, correctly held that payments may be deemed to have been extorted under the Hobbs Act, on the basis of generalized suspicion of illegality and defendant's failure to proffer a legitimate explanation for them, notwithstanding the absence of any evidence of fear by the payer or the purpose of the payments.

3. Whether the Second Circuit, in conflict with *United States v. Cabrales*, 524 U.S. 1 (1998), correctly held that for purposes of satisfying the interstate commerce element on money laundering charges under 18 U.S.C. § 1956, the underlying criminal activity – as opposed to the laundering itself — can be considered.

STATEMENT PURSUANT TO RULE 14.1(b) AND RULE 29.6

In addition to petitioner Anthony Ciccone and respondent United States of America, parties to the proceeding in the Court of Appeals also included Peter Gotti, Richard Bondi and Richard G. Gotti.

The parties have no parent or subsidiary companies and do not issue stock.

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OPINIONS BELOW

The opinion of the court of appeals is reported at *United States v. Gotti*, 459 F.3d 296 (2d Cir. 2006), and is reproduced in the appendix hereto at App. 1a-113a. The order denying rehearing is unreported but is reproduced at App. 123a. The district court's denial of defendant's motion to dismiss before trial is unreported but a relevant excerpt from the bench is reproduced at App. 114a-115a. The district court's denial of the motion of all defendants for judgment of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure is unreported but a relevant excerpt from the bench is reproduced at App. 116a-122a.

JURISDICTION

The judgment of the court of appeals was entered on July 12, 2006, and rehearing was denied on October 19, 2006. App. 1a, 123a. This Court has jurisdiction under 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

Title Eighteen, Section 1951 of the United States Code reads in relevant part:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.
>
> (b) As used in this section—
>
> * * *

> (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

STATEMENT OF THE CASE

Absent this Court's intervention, the decision below portends a serious expansion of criminal liability for extortion under the Hobbs Act, 18 U.S.C. § 1951 — to include deprivations of interests having the most remote nexus to "property," and on proof of little more than unexplained, suspicious activity. Petitioner seeks review of the ruling of the Second Circuit Court of Appeals that the rights of union members to free speech, democratic procedures and disinterested representation constitute "property" that can be "obtain[ed]" within the meaning of extortion in the Hobbs Act, 18 U.S.C. § 1951(b)(2). Petitioner also seeks review of the court of appeals' ruling that unexplained but "suspicious" payments without evidence of fear by the payer or the purpose of the payments can allow a jury to find extortion. Lastly, Petitioner seeks review of the court of appeals' holding that for purposes of establishing an impact on interstate commerce in a money laundering case, the underlying criminal activity, as opposed to the financial transactions said to constitute laundering, may be considered.

A. The *Scheidler* Decision

Because much of the case background involves this Court's decision in *Scheidler v. National Organization for Women, Inc.*, 537 U.S. 393 (2003),[1] the decision, handed down while summations were occurring at the end of the trial below, is summarized here.

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[1] This is the second of three decisions by this Court in the *National Organization for Women, Inc. v. Scheidler* litigation. The first, often

(Cont'd)

In *Scheidler*, this Court held that extortion under the Hobbs Act requires proof that the property in question was actually "obtained," meaning that there was "both a deprivation and acquisition of property." *Id.* at 402-04. The case concerned anti-abortion protesters charged with extorting the property rights of patients to seek services in clinics and of doctors, nurses and other staff to work "free from wrongful threats, violence, coercion and fear." *Id.* at 400-01. Despite the straightforward statutory definition of extortion as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right," 18 U.S.C. § 1951(b)(2), lower courts, led by the Second Circuit's "admittedly expansive" interpretations of property and obtaining, had held, *inter alia*, that obtaining of property was not strictly necessary. *See United States v. Arena*, 180 F.3d 380, 394 (2d Cir. 1999). Although the Court granted certiorari to consider both the nature of "property" under the Hobbs Act and whether such property must be "obtained," the Court decided the case on the "obtaining" issue, declining to decide whether the rights in question constituted property. *Id.* at 401-02.

The central holding of *Scheidler* is that the Hobbs Act literally requires "the obtaining of property," meaning that the offenders "could exercise, transfer or sell" the property in question:

> [E]ven when . . . acts of interference and disruption achieved the[] ultimate goal of 'shutting down' a

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(Cont'd)

known as "*Scheidler I*," is *National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249 (1994). The third, often known as "*Scheidler III*," is *Scheidler v. National Organization for Women, Inc.*, 126 S. Ct. 1264 (2006). Although the case cited in the text is often known as *Scheidler II*, and is so described in the court of appeals' decision, unless context otherwise requires, it is simply described here as "*Scheidler*."

> clinic that performed abortions, such acts did not constitute extortion because petitioners did not 'obtain' respondents' property. Petitioners may have deprived or sought to deprive respondents of their alleged property right of exclusive control of their business assets, but they did not acquire any such property. Petitioners neither pursued nor received 'something of value from' respon ents that they could exercise, transfer or sell.

Id. at 404-05. *Scheidler* repudiated the reasoning of the Second Circuit in *United States v. Arena*, 180 F.3d 380, 394 (2d Cir. 1999), which had read the word "obtain" to go beyond "to gain or attain the possession or disposal of" to a broader notion of "the regulation of the fate . . . of something." This Court concluded that strict construction of criminal statutes requires a more familiar meaning of the word "obtain" than regulation of the fate of property. 537 U.S. 403 at n.8, 408.

By the same token, this Court reasoned that to permit a Hobbs Act extortion charge to rest only upon a showing of interference with another's rights would

> eliminate the recognized distinction between extortion and the separate crime of coercion . . . [T]he crime of coercion, which more accurately describes the nature of petitioners' actions, involves the use of force or threat of force to restrict another's freedom of action.

Id. at 406. The Court emphasized that coercion statutes at the time of enactment of the Hobbs Act authorized "prosecution of individuals who, like petitioners, employed threats and acts of force and violence to dictate and restrict the actions and decisions of businesses." *Id.* The Court cited examples of cases under the New York coercion statute, such as coercion of a business to

join a trade association, or to compel a manufacturer to enter into an agreement with a labor union, or to compel union members to drop lawsuits regarding union finances. The Court found it significant that in enacting the Hobbs Act and modeling it on New York law, Congress chose to prohibit extortion, but *not* to prohibit coercion. *Id.* at 405-06.

Other than to note the Solicitor General's concession that the right of a woman to seek medical services is a liberty rather than a property interest, the Court declined to "trace the outer boundaries" of the nature of property under the Hobbs Act. *Id.* at 401 & n.5. Thus, the Court did not address cases on this point, such as *United States v. Tropiano*, 418 F.2d 1069, 1076 (2d Cir. 1969), which had held that intangible property interests were cognizable under the Hobbs Act, upholding prosecution of defendants for intimidating a rival from soliciting customers on a garbage route. This Court neither approved nor disapproved of *Tropiano*, stating that it is "mistaken to suggest that our decision reaches, much less rejects, lower court decisions such as *United States v. Tropiano*, 418 F.2d 1069, 1076 (2d Cir. 1969)." 537 U.S. at 402 n.6.

B. Proceedings in the District Court

Prior to any decision in *Scheidler*, petitioner Anthony Ciccone, 72, was named in a multi-count indictment, and is now serving a 15-year sentence issued by the United States District Court for the Eastern District of New York, following convictions on numerous counts.[2] The government's case

2. Defendant was convicted of two counts of conspiring and conducting an enterprise through a pattern of racketeering, 18 U.S.C. § 1962(c),(d); twenty-one counts of extortion and extortion conspiracy, 18 U.S.C. § 1951; twelve counts of wire fraud and conspiracy, 18 U.S.C. § 1343; eighteen counts of money laundering and conspiracy, 18 U.S.C. § 1956; two counts of illegal gambling, 18 U.S.C. § 1955; and one count of witness tampering, 18 U.S.C. § 1512.

consisted of multiple allegations of extortion and fraud against union entities operating along the waterfront in Brooklyn, New York as well as individuals associated with the commerce there. Defendant, previously a lifelong longshoreman and union member and officer, but banned from union positions and affairs by a 1992 consent decree, was alleged to have become a "captain" in the Gambino crime family, and that through "actual and threatened force, violence and fear," the Gambino family together with the Genovese family "exercised influence over labor unions and businesses at commercial shipping terminals in New York and New Jersey." App. 7a.

The gravamen of the government's case consisted of Hobbs Act extortion charges against three union entities, and central among the theories charged in the indictment were that petitioner and others extorted rights of "free speech and democratic participation in the affairs of [a] labor organization as guaranteed by [the Labor-Management Reporting Disclosure Act, 29 U.S.C. § 401 et seq."], or "of rights to have union officials "discharge their duties with respect to the [union entity] solely in the interest of the [entity] and its participants and beneficiaries . . ." App. 6a-13a.

For example, with respect to ILA, the International Longshoremen's Association, the government alleged that the defendants used fear and intimidation "in order to control who filled various International Executive Officer and other ILA positions, and thereby to ensure that organized crime associates would be placed in those positions." At trial, the government cited an alleged agreement allocating to the Gambino family "control" of piers in Brooklyn and to the Genovese family control of piers in Manhattan and New Jersey and that Ciccone, while not a union official, represented the Brooklyn waterfront for the Gambino family and that union officials worked for him. The government contended that defendants extorted from the

ILA membership, *inter alia*, their democratic and free speech rights by attempting to influence officers to support a particular candidate for assistant general organizer at the ILA convention in 2000. No votes were cast by defendants, nor were any actual threats proven. In fact, defendant Ciccone had said to expect the official in question, Harold Daggett, to be elected general organizer when in fact he was elected assistant general organizer. The government's own witness testified that Ciccone had little influence at the 2000 election. *See* App. 6a-9a; Trial Transcript ("Tr.") 850-51.

With respect to MILA, the ILA's health benefits trust, it was alleged that the defendants sought "to ensure" that a particular company was awarded a pharmaceutical contract. The government contended that union democratic rights were extorted in that defendants allegedly sought to influence MILA's award of a health benefits prescription contract to a particular company, GPP/VIP, and to influence subsequent renewal of that contract. Initially, union and management trustees agreed to split the contract between GPP/VIP and another company. Upon renewal, when management recommended another company, the union trustees originally agreed but then withdrew support in favor of GPP/VIP. One union trustee testified that Ciccone wanted him to support GPP/VIP, although that trustee initially supported the other company on contract renewal. The government also introduced co-conspirator statements contending that kickbacks were paid from GPP/VIP to defendant Ciccone. *See* App. 9a-12a.

With respect to Local 1 of the ILA, it was alleged that the defendants sought "to intimidate a Local 1 delegate and other Local 1 officers into deferring to the will of defendants . . . in the conduct of the affairs of Local 1." The government elicited evidence that "Red" Scollo, President of Local 1814, was having problems with a Local 1 delegate and spoke to Ciccone.

Although Ciccone asked co-defendant Cassarino to speak to the delegate, apparently no call occurred, and nothing happened. At another point, Cassarino and co-defendant Bondi waited outside Saccenti's home to speak to him, but Ciccone told them to leave. Scollo also testified that he objected to certain work rule changes implemented by Saccenti and that Ciccone had said the changes should not happen without his approval. No evidence of any threat communicated to the delegate or any other member of Local 1 was taken, nor did any Local 1 member even testify. *See* App. 13a-16a.

Before trial, defendant, relying in part on this Court's grant of certiorari in *Scheidler*, moved to dismiss on the ground that the above-described union interests cannot constitute property nor could they be obtained within the meaning of the Hobbs Act. The district court denied the motion in part on the ground that circuit authority, including *United States v. Arena*, 180 F.3d 380 (2d Cir. 1999), allowed the theory. App. 114a-15a.

While summations in the case were in progress, this Court then handed down the *Scheidler* decision. Defendants immediately sought various forms of relief, including a mistrial, objections to the jury charge and renewed motions to dismiss pursuant to Rule 29 of the Federal Rules of Criminal Procedure. The district court denied these motions. The court held that, unlike the abortion rights at issue in *Scheidler*, the defendants in this case, obtained the rights to union democracy. Among other things, defendants also sought dismissal under *Scheidler* in post-trial motions. The district court held (App. 116a-122a) that there were valid property interests, although it questioned whether "at some future time some court may say that intangible property rights do not extend to freedom of speech or the exercise of democratic voting rights, I don't know." App. 118a. The court went on to say that this property had been "obtained" by the defendants and that defendants exercised those rights for their own gain. *Id.*

C. Proceedings in the Court of Appeals

In a lengthy opinion (App. 1a-113a), the Second Circuit Court of Appeals affirmed the convictions,[3] and rejected, *inter alia*, petitioner's argument that *Scheidler* required reversal of numerous counts, including those alleging extortion of union democratic rights.[4] Petitioner challenged whether the union democratic rights constituted "property" under the Hobbs Act and also whether they could be "obtained" under the Hobbs Act, particularly in light of this Court's decision in *Scheidler*.

In *Scheidler*, as described above, this Court granted certiorari on the same two issues in a case concerning anti-abortion protesters charged with extorting the property rights of patients to seek services in clinics and of doctors, nurses and other staff to work "free from wrongful threats, violence, coercion and fear." 537 U.S. 400-01. This Court held that extortion under the Hobbs Act requires proof that the property in question was actually "obtained" rejecting lesser theories of "coercion" and repudiating the reasoning of *United States v. Arena*, 180 F.3d 380, 394 (2d Cir. 1999), which had read the word "obtain" to go beyond "to gain or attain the possession or

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3. The Court of Appeals remanded for resentencing in light of this Court's intervening decision in *United States v. Booker*, 543 U.S. 220 (2005). App. 112a. Resentencing has not yet taken place. Consequently, no sentencing issues are raised here.

4. Although the affected counts charged extortion of other interests as well, because the jury did not specify which theory it upheld, the counts required reversal in their entirety. Petitioner maintains that other counts are affected by *Scheidler* even though they do not charge extortion of union democratic rights. These include the "right of [Tommy Ragucci] to be an employee of Howland Hook Container Terminal," "the right [of Aleyev] to conduct a business free from outside pressure . . . and the right to sell a business free from outside pressure," or "the right [of Steven Seagal] to make business decisions free from outside pressure" App. 59a-61a.

disposal of" to a broader notion of "the regulation of the fate . . . of something." Despite including it in the certiorari grant, this Court did not address the "property" issue, stating that it is "mistaken to suggest that our decision reaches, much less rejects, lower court decisions such as *United States v. Tropiano*, 418 F.2d 1069, 1076 (2d Cir. 1969)." *Scheidler*, 537 U.S. at 402 n.6.

Strangely, despite the overturning of *Arena* and this Court's declination to even address *Tropiano*, in this case, the court of appeals "believe[d] that the appropriate interpretation of *Scheidler II* must be one that co-exists with *Tropiano*." App. 52a. The court of appeals even went so far as to suggest that this Court had "indicated that *Tropiano* remains good law notwithstanding *Scheidler II*." App. 55a.

With the task thus defined, on the "property" issue, the court of appeals invoked *Tropiano*'s broad conception that "The concept of property under the Hobbs Act . . . is not limited to physical or tangible property or things but includes, in a broad sense, any valuable right considered as a source or element of wealth and does not depend upon a direct benefit being conferred on the person who obtains the property." App. 47a (*quoting* 418 F.2d at 1076). Relying on *United States v. Bellomo*, 176 F.3d 580, 592-93 (2d Cir. 1999) and without any analysis, the court of appeals then simply concluded that the union democratic rights fell under *Tropiano*'s broad conception allowing intangible property to constitute "property" within the meaning of the Hobbs Act. App. 46a-48a. Later, without addressing whether union democratic rights can be property, the court of appeals reiterated its view of *Tropiano*'s continuing validity and held that "intangible property rights can qualify as extortable property rights." App. 52a-53a.

Turning to the obtaining issue, the court of appeals deemed it "a two-part inquiry that requires both a deprivation and an acquisition of property," App. 53a, and that the key concept is

this Court's statement that the defendants in *Scheidler* "neither pursued nor received something of value from respondents that they could *exercise, transfer, or sell* ." *Id.* (*quoting Scheidler*, 537 U.S. at 405)(adding emphasis). Again invoking the objective of reconciling *Scheidler* with its own 1969 decision in *Tropiano*, the court of appeals concluded that whereas in *Scheidler* the protesters simply tried to stop the abortion clinic patients from exercising their rights but did not try to exercise them themselves, in *Tropiano* the defendants did more than try to stop the rival from soliciting customers, but rather, sought to retain that right for themselves. App. 55a-56a.

Applying this reasoning to this case, the court of appeals concluded, *inter alia*, that union democratic rights can be "obtained" under *Scheidler*. The court reasoned that defendants "sought to exercise those rights themselves, by telling various delegates whom to vote for in certain leadership positions, and by controlling various elected officials' performance of their union duties." App. 57a. The court extended its conclusion to the other *Scheidler* based claims, App. 57a-61a. The court also rejected various other arguments advanced by the appellants, and, save for sentencing remands (App. 112a), affirmed the convictions of all defendant-appellants.

REASONS FOR GRANTING THE PETITION

This case presents issues that satisfy this Court's traditional criteria for review in that they are important, recurring and pose conflicts with decisions of this Court and of other lower courts. The issues arise principally under the Hobbs Act which severely punishes robbery and extortion affecting interstate commerce and which, under the holdings of the court of appeals, would threaten to become an expansive statute of uncertain contours that could easily be made applicable to unexpected or even ordinary behavior. The first issue, whether union democratic rights constitute "obtainable property" under the

Hobbs Act, includes a question on which this Court previously granted certiorari in *Scheidler v. National Organization for Women, Inc.*, 537 U.S. 393 (2003) but without resolving the issue – what constitutes "property" under the Hobbs Act. On this question, the court of appeals invoked an "admittedly expansive" 1969 standard that "property" should be construed broadly to include any rights considered a "source or element" of wealth, and that rights to free speech and union democracy fall under that standard. This decision comes in conflict with holdings of this Court and other lower courts interpreting "property" more narrowly under federal law and the Hobbs Act strictly. The decision below also implicates the court of appeals' compliance with the holding in *Scheidler* that property must be obtained — as opposed to regulated, frustrated or coerced – given that here the defendants did not and could not meaningfully exercise union rights even if they did seek to coerce them.

The second issue is whether Hobbs Act extortion is shown by unexplained but "suspicious" payments where there is no evidence of fear by the payer or even the purpose of the payments. The court of appeals' reliance on general suspicion of illegality and the failure of defendant to show legitimacy places it in conflict with numerous other circuits. Together, these holdings potentially render the Hobbs Act's extortion provision an ill-defined and sweeping prohibition capable of criminalizing a broad swath of conduct, much of it potentially innocent and not otherwise recognizable as extortion.

The third issue, whether the interstate commerce affects of money laundering can be premised on the underlying criminal activity as opposed to the laundering activity is yet another question where the court below finds itself in conflict with this Court.

I. This Court Should Resolve the Dispute Whether Union Free Speech and Democratic Rights Are Obtainable Property Under the Hobbs Act and Under This Court's Decision in *Scheidler v. National Organization for Women, Inc.*, 537 U.S. 393 (2003).

In *Scheidler v. National Organization for Women, Inc.*, 537 U.S. 393 (2003) this Court granted certiorari to address the issue of what constitutes "obtainable property" under the Hobbs Act, but, while addressing the "obtaining" issue, left the property question unresolved. This is a fitting and important case to address the property issue, as the court below, in conflict with this Court and other lower courts, adopts a consciously expansive 1969 conception of property at odds with common sense and current jurisprudence. The holding below also conflicts with this Court's holding in *Scheidler* requiring that the property in question actually be obtained – as opposed to lesser actions of regulation, frustration or coercion. Because of these conflicts and the sheer illogic of the idea of "obtaining property" in the form of union democratic rights, intervention by this Court is warranted.

A. This Court Previously Granted Certiorari On the Property Issue Without Resolving It, and Should Return to Address It Here.

This is a fitting case for this Court to return to the property issue left open in *Scheidler*.[5] The treatment of the issue by the court of appeals places it in apparent conflict with decisions of this Court as well as with other lower courts. This can be seen on several levels.

5. This Court has returned to issues on which certiorari had been previously granted but where for whatever reason the issue was not decided. *See, e.g., Wilder v. Virginia Hospital Assoc.*, 496 U.S. 498, 505 n.5 (1990); *Michigan v. Payne*, 412 U.S. 47, 48 n. 2 (1973); *Leedom v. Kyne*, 358 U.S. 184, 187 (1958); *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212, 215 (1947).

1. The court of appeals' decision is in conflict with *Scheidler* in the very basic sense that it regards this Court as having endorsed the court of appeals' 1969 decision in *United States v. Tropiano*, 418 F.2d 1069, 1076 (2d Cir. 1969). In *Scheidler*, although this Court granted certiorari as to both the "property" and "obtaining" prongs of the definition of extortion under the Hobbs Act, in its decision the Court did not decide the property issue. The Court explicitly deemed it "mistaken to suggest that our decision reaches, much less rejects, lower court decisions such as *United States v. Tropiano*, 418 F.2d 1069, 1076 (2d Cir. 1969)." *Scheidler*, 537 U.S. at 402 n.6. Nonetheless, the court of appeals divined some sort of approval of *Tropiano* and declared that this Court had "indicated that *Tropiano* remains good law notwithstanding *Scheidler II*." App. 55a. Indeed, the court of appeals went so far as to state its "belie[f] that the appropriate interpretation of *Scheidler II* must be one that co-exists with *Tropiano both as to the 'property' and 'obtaining' prongs*." App. 52a (emphasis added). The court of appeals, in other words, elevated its 1969 decision in *Tropiano* to the determinant of, not only the property issue to which it addresses (albeit without any subsequent approval from *Scheidler*), but also of the "obtaining" issue which it does not discuss. This alone warrants the Court's attention.

2. Moreover, *Tropiano*, the adopted authority of the court below, conflicts with holdings of this Court and other courts of appeal. Simply from an interpretive perspective, *Tropiano* and its progeny are premised on liberal interpretation of the Hobbs Act that directly conflicts with *Scheidler*'s application of strict construction to the Act. Freely characterizing it as "expansive," the court of appeals adopted *Tropiano*'s statement that

> [t]he concept of property under the Hobbs Act . . . is not limited to physical or tangible property or things but includes, in a broad sense, any valuable

> right considered as a 'source or element of wealth and does not depend upon a direct benefit being conferred on the person who obtains the property.

App. 47a (*quoting Tropiano*, 418 F.2d at 1076). *Tropiano*, justifies this expansive definition by citation to *Stirone v. United States*, 361 U.S. 212 (1960) for the proposition that the Hobbs Act "speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence." *Tropiano*, 418 F.2d at 1075 (*quoting Stirone*, 361 U.S. at 215).

The problem is that this concept of liberal construction of the Hobbs Act reflected in the court of appeal's adoption of *Tropiano* was decisively rejected in *Scheidler*'s holding that *strict* construction in the form of the rule of lenity is mandated in construing the Hobbs Act. This Court explained in *Scheidler* that the statement in *Stirone* refers to using all of Congress' power under the commerce clause, not that liberal construction of the Hobbs Act was mandated or even appropriate. *See* 537 U.S. at 408. Thus, the invocation of *Tropiano*'s "broad" and "expansive" conception of property collides inexorably with *Scheidler*.

3. *Tropiano*'s conception of property also conflicts with this Court's holding in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999). In *Tropiano*, which concerned alleged extortion of the right to pursue business in a particular geographical area, the Second Circuit premised its expansive concept of property on the idea that "[t]he right to pursue a lawful business including the solicitation of customers necessary to the conduct of such business has long been recognized as a property right within the protection of the Fifth and Fourteenth Amendments of the Constitution." 418 F.2d at 1076. Whatever validity this

conclusion had in 1969, it is in conflict with this Court's authority now. In *College Savings Bank*, this Court held: "The assets of a business (including its good will) unquestionably are property, and any state taking of those assets is unquestionably a 'deprivation' under the Fourteenth Amendment. But business in the sense of the activity of doing business, or the activity of making a profit is not property in the ordinary sense . . ." 527 U.S. at 675.[6]

4. Even if, as *Scheidler* declines to answer, the "outer boundaries of extortion liability under the Hobbs Act" may include "something as intangible as another's right to exercise exclusive control over the use of a party's business assests," 537 U.S. at 400, any conclusion that so-called rights to union democracy and free speech make safe passage into this outer boundary of "property" falls into further conflict with other lower courts. Among the cases that subscribe to the idea that union free speech and democratic rights are "property," the closest thing to any coherent rationale is that union members' rights to free speech, democratic participation and loyal and responsible representation "have direct economic value because the advancement of the members' economic interests through collective action is the raison d'etre of unions." *United States v. Bellomo*, 954 F. Supp. 630, 643 (S.D.N.Y. 1997).[7]

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6. *Scheidler* refers to property under the Hobbs Act as "business assets." 537 U.S. at 405.

7. In determining that "union democratic rights" constitute property under the Hobbs Act the court below simply followed a prior decision, otherwise barren of any analysis, that "the right of the members of a union to democratic participation in a union election is property." App. 47a-48a (*quoting United States v. Bellomo*, 176 F.3d 580, 592-93 (2d Cir. 1999)). Other courts deeming union democratic rights to constitute property under the Hobbs Act include *United States v. Debs*, 949 F.2d 199, 202 (6th Cir. 1992) ; *United States v. Local 560*, 780 F.2d

(Cont'd)

But as the *College Savings* case discussed above indicates, impact on economic well being does not render any particular right into property. Any number of legal rights can affect the bottom line of a business but even "the activity of doing business" much less the activity of advancing union interests would not be considered property under that case. 527 U.S. at 675. Or as the dissenting court in the line of cases finding union democratic rights to be property put it, "how can [a] union member's rights be exercised, transferred or sold?" *United States v. Bellomo*, 263 F. Supp. 2d 561, 575-76 (E.D.N.Y. 2003).

The cases suggesting that union democratic rights constitute property under the Hobbs Act are also in conflict with the cases holding that those same rights do *not* constitute property under the mail and wire fraud statutes. In *McNally v. United States*, 483 U.S. 350 (1987), this Court held that the mail and wire fraud statutes were limited to the schemes directed at defrauding property, and that schemes to defraud a victim of the intangible right to honest or loyal services did not fall under the statute. Following that decision, a number of lower courts held that schemes to defraud the very types of interests at issue here, such as union democracy and loyalty, do not fall under the fraud statutes because they were not directed at property. *See, e.g.*, *United States v. Runnels*, 877 F.2d 481 (6th Cir. 1989)(en banc); *United States v. Zauber*, 857 F.2d 137, 143-44 (3d Cir. 1988)(scheme to deprive union pension fund of honest services

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267, 281-82 (3d Cir. 1986); *United States v. Muscarella*, 2004 WL 2186561 (S.D.N.Y. 2004); *United States v. Local 1804-1*, 812 F. Supp. 303, 1338 (S.D.N.Y. 1993), *aff'd*, 52 F.3d 1173 (2d Cir. 1995); *United States v. Dist. Council of New York City and Vicinity of the United Bhd. of Carpenters and Joiners of Am.*, 778 F. Supp. 738, 755-56 (S.D.N.Y. 1991); *United States v. Int'l Bhd. of Teamsters*, 765 F. Supp. 1206, 1210 (S.D.N.Y. 1991).

of employees); *United States v. Lombardo*, 865 F.2d 155, 158-59 (7th Cir. 1989)(theory of defrauding union pension fund of faithful services of union officials invalid). Attempts to reconcile these conflicting lines of authority and to explain how union democratic rights constitute property under the Hobbs Act but not under the mail and wire fraud statutes are not persuasive. *See United States v. Debs*, 949 F.2d 199 (6th Cir. 1992)(focusing on *McNally*'s federalism rationale in not wanting to set standards for state and local governments and distinguishing unions as "more like one-party government"). This conflict among the lower federal courts in interpretation of the term "property" in federal criminal statutes is worthy of this Court's intervention.

Finally, the idea that rights to union democracy and free speech in particular constitute property lacks any logic. Simply at face value, such rights, whatever indirect connection they have to earning income, fall far more naturally into the category of legal rights or liberty interests rather than "business assets" or property. By way of illustration of the vague line created by the court below, in another case, the U.S. Attorney's Office for the Eastern District of New York, the same office that prosecuted this case, while insisting that "democratic rights" are property, actually conceded that the "free speech" rights of union members would not constitute property under the Hobbs Act. *United States v. Bellomo*, 263 F. Supp. 2d 561, 575 (E.D.N.Y. 2003).[8] This concession (never offered in this case) simply underscores the vicissitudes in trying to draw a precise line in and among union rights. This Court should intervene to consider a more straightforward analysis.

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8. Denominating a right to free speech "property" seems particularly dubious. Beyond that, one would think that courts should hesitate to lump that precious right into a category – property – that presumably would make it more subject to regulation.

B. The Decision Below Conflicts With Scheidler's Holding that Mere Coercion or Regulation of Property Does Not Constitute an Obtaining of that Property.

Further ground for granting certiorari lies in the failure of the court below to adhere to the decision of this Court in *Scheidler* concerning the obtaining issue which it did address.

1. The decision below loses sight of the singularly-significant overturning in *Scheidler* of the Second Circuit's decision in *United States v. Arena*, 180 F.3d 380, 394 (2d Cir. 1999). *Arena*, unlike *Tropiano*, after all, is about the obtaining issue decided in *Scheidler*. But in *Arena*, the court below adopted the same "admittedly expansive" view of the Hobbs Act, holding that with respect to obtaining of property, it is enough to "frustrate" the exercise of those property rights or "regulate the fate" of property. As the *Arena* court continued, "where the property in question is the victim's right to conduct a business free from threats of violence and physical harm, a person who has committed or threatened violence or physical harm in order to induce abandonment of that right has obtained, or attempted to obtain, property within the meaning of the Hobbs Act." *Id.* at 394.

In no uncertain terms, this Court rejected this formulation in *Scheidler*, 537 U.S. at 403 n.8. Indeed, this Court continued and explained that compromises over the meaning of obtaining would "eliminate the recognized distinction between extortion and the separate crime of coercion . . . [which] involves the use of force or threat of force to restrict another's freedom of action." *Id.* at 406. The Court explained that the Hobbs Act would not cover instances of mere coercion such as the "prosecution of individuals who . . . employed threats and acts of force and violence to dictate and restrict the actions and decisions of

businesses." *Id.* at 405-06. This Court reasoned that to permit a Hobbs Act extortion charge to rest only upon a showing of interference with another's rights would

> eliminate the recognized distinction between extortion and the separate crime of coercion . . . [T]he crime of coercion, which more accurately describes the nature of petitioners' actions, involves the use of force or threat of force to restrict another's freedom of action.

Id. at 406. The Court cited examples of cases under the New York coercion statute, such as coercion of a business to join a trade association, or to compel a manufacturer to enter into an agreement with a labor union, or to compel union members to drop lawsuits regarding union finances. The Court found it significant that in enacting the Hobbs Act and modeling it on New York law, Congress chose to prohibit extortion, but *not* to prohibit coercion. *Id.* at 405-06.

The court of appeals fails to explain how the government's theory in this case differs materially from the coercion and *Arena* formulations rejected in *Scheidler*. The alleged efforts to coerce union delegates or officials to vote for certain officers, or to award a contract to a particular bidder or to make a particular personnel decision do not materially differ from the concept of inducing abandonment of a right as formulated in *Arena* and rejected by *Scheidler*. Nor do they differ materially from the coercion cases concept of "dictat[ing] and restrict[ing] the actions and decisions of businesses" also rejected in *Scheidler* as a viable test. Defendants here were not accused of actually obtaining union votes and casting them, or actually voting to award a contract. And the theory presented to the jury that they obtained "free speech" remains nonsensical to this day.

Similarly, the court of appeals fails to explain how the defendants here, with respect to union democratic rights, "pursued []or received something of value from respondents that they could *exercise, transfer, or sell.*" App. 53a (adding emphasis). It is difficult to understand how defendants, on any rational meaning of the words, could "exercise, transfer, or sell" the rights in question any more than the abortion protesters could exercise the rights of the clinics. While the court of appeals asserts that the distinction here is that defendants "caused the relinquishment" of the union rights in the self-interest of the defendants, *id.* at 54a-55a, clearly such self-interest is at the heart of the rejected theories in *Scheidler* as well. This is especially so with the coercion examples given by the Supreme Court that do not involve extortion. In those instances, coercion of a business to join a trade association, or to compel a manufacturer to enter into an agreement with a labor union, or to compel union members to drop lawsuits regarding union finances had the very components at play here, yet were given as examples of *coercion* not extortion by this Court. *Id.* at 405-06.

For these reasons as well, this Court should issue the writ of certiorari on the Hobbs Act issue of whether obtainable property was at issue in this case.

II. The Conclusion of the Court of Appeals that Hobbs Act Extortion Can Be Founded On Unexplained, "Suspicious" Payments Dangerously Expands the Offense and Shifts the Burden of Proof.

The decision of the Second Circuit also conflicts with other courts of appeal and dangerously broadens Hobbs Act extortion liability by allowing an extortion conviction to be premised on unexplained, "suspicious" payments without any evidence of the purpose of the payments or even that the payer was fearful. The court's holding is premised on lines of reasoning concerning

evidentiary sufficiency that other courts of appeal squarely reject — speculation that "something" illegal was happening and shifting the burden to defendant to proffer a "legitimate" explanation. In tandem with the interpretation of "obtaining property," the Second Circuit's holding potentially renders the Hobbs Act a dangerous and expansive statute applicable to innumerable "property" interests based on speculative proof.

A. Background

As the court of appeals described, the "gravamen of these counts was that certain defendants, including defendant-appellant Ciccone, had extorted cash payments over a period of time from Carmine Ragucci, the then-owner of a shipping terminal in Staten Island." App. 16a. The salient facts are simply that Ciccone received payments through intermediaries from Ragucci, but there is no evidence in the record what the payments were for. Ragucci never testified, and "Red" Scollo, the main intermediary and only witness with knowledge testified that he did not know the purpose of the payments (Tr. 1663, 1391). Scollo could only offer that the payments were made in a surreptitious manner and his subjective opinion that the payments must have been illegal. Scollo added that Ciccone would be "a little pissed off" when the payments were late, and that Scollo would convey that to Ragucci. No evidence whatsoever was elicited that Ragucci was in fear, or why he made the payments at all. App. 16a-18a.

The court of appeals concluded that "a reasonable jury could have concluded that Ciccone obtained these cash payments from Carmine Ragucci by exploiting Ragucci's fear of Ciccone, particularly given Scollo's testimony that Ciccone would be 'pissed off' when the payments were late, and that Scollo would then communicate that displeasure to Ragucci." App. 75a. The court of appeals emphasized illegality or illegitimacy in the abstract as the basis of proof of extortion, underscoring that

witnesses "did not know of any legitimate basis for these payments" or that Scollo "knew his involvement in it was 'not the proper thing to do.'" *Id.* Even though nobody, Ragucci included, testified about the purpose of the payments, the court of appeals drew the negative inference that there was "no affirmative evidence whatsoever that these payments were for a legitimate purpose, such as repayment of a loan or payment for services rendered." *Id.*

B. The Decision Conflicts With Decisions of Several Circuits

The decision of the court of appeals conflicts with several other circuits that forbid speculation that "something" illegal transpired and criticism that defendant did not prove a legitimate explanation as substitutes for proof of the charged offense beyond a reasonable doubt. The net effect is an overbroad construction of the Hobbs Act, rendering it an unexplained property transfer statute not requiring any proof of fear by the payer or even the purpose of the payment.

The prosecution was obligated to show beyond a reasonable doubt that defendant "obtain[ed] . . . property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right" 18 U.S.C. § 1951(b)(2).[9] On appellate review, to be sure, a defendant bears a heavy burden and "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). At the same time,

9. The court below has applied the standard whereby "defendant must knowingly and willfully create or instill fear, or use or exploit existing fear with the specific purpose of inducing another to part with his or her property." *United States v. Abelis*, 146 F.3d 73, 83 (2d Cir. 1998).

"[i]t would not satisfy the Sixth Amendment to have a jury determine that the defendant is *probably* guilty. . . ." *Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993) (emphasis in original). Appellate courts agree that "a conviction based on speculation and surmise alone cannot stand." *United States v. D'Amato*, 39 F.3d 1249, 1256 (2d Cir. 1994); *see, e.g., United States v. Leos-Quijada*, 107 F.3d 786, 794 (10th Cir. 1997)(jury's inferences must be "more than speculation and conjecture in order to be reasonable"); *United States v. Perez-Tosta*, 36 F.3d 1552, 1557 (11th Cir. 1994)("reasonable inferences, and not mere speculation, must support the jury's verdict").

In this case the court of appeals applied these principles in a manner conflicting with decisions of other courts of appeal. Indisputably without any evidence to cite of any fear by the payer or reason for the payments, the court of appeals emphasized illegality or illegitimacy in the abstract as the basis of proof, underscoring that witnesses "did not know of any legitimate basis for these payments" or that one witness "knew his involvement in it was 'not the proper thing to do.'" App. 75a. Multiple courts of appeal have held, however, that the inference that "something illegal" happened is no substitute for otherwise wanting proof beyond a reasonable doubt. The District of Columbia Circuit, for example, has held that "evidence that implies . . . general knowledge of criminality afoot is insufficient to sustain a conviction for aiding and abetting a specific crime" *United States v. Teffera*, 985 F.2d 1082, 1086-87 (D.C. Cir. 1993). The Fifth Circuit has held, "It is not enough for [the government] merely to establish a climate of activity that reeks of something foul." *United States v. Wieschenberg*, 604 F.2d 326, 331-32 (5th Cir. 1979). Other courts subscribe to this fundamental principle. *See United States v. Rahsperian*, 231 F.3d 1257, 1262-63 (10th Cir. 2000)(rejecting argument that defendant's conduct was "incriminating in some way"); *United States v. Dean*, 59 F.3d 1479, 1487 (5th Cir. 1995) ("[E]vidence

sufficient to support a reasonable inference that a defendant was knowingly acting as a lookout was insufficient support for the further inference that the defendant knew what he was protecting."); *United States v. Pena*, 983 F.2d 71, 72-73 (6th Cir. 1993) (automobile passenger's direct admission that she "felt" something illegal was occurring around her was not sufficient to show that she knew of cocaine hidden in the vehicle); *United States v. Wexler*, 838 F.2d 88, 91-92 (3d Cir. 1988) (despite evidence that the defendant acted as a lookout, "the absence of evidence linking defendant to the specific object of the conspiracy proved fatal" to the government's case when "[t]he evidence is just as consistent, for example, with a conspiracy to transport stolen goods, an entirely different crime").[10]

The court of appeals also drew itself into a conflict at the very least with the 11th Circuit and seemingly long-settled fundamental due process principles when it faulted defendant for not pointing to evidence of any legitimate reason for the

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10. Before this case, the Second Circuit had subscribed to this principle. *United States v. Wiley*, 846 F.2d 150,155 (2d Cir. 1988) ("a general suspicion or knowledge [of illegality is] . . . not enough")(*quoting United States v. Zambrano*, 776 F.2d 1091, 1097 (2d Cir. 1985)). *See United States v. Santos*, 449 F.3d 93, 103 (2d Cir. 2006 (as amended))("Even though a conviction can rely on circumstantial evidence, "suspicious circumstances" are not enough to sustain a conviction.") *United States v. Cruz*, 363 F.3d 187, 198-99 (2d Cir. 2004)(defendant "likely knew that some type of crime was being committed . . . [but] there is little evidence in the record which suggests that Cruz knew of the specific crime Medina proposed to commit or that Cruz intended to facilitate such a crime."); *United States v. Nusraty*, 867 F.2d 759, 765, 766-67 (2d Cir. 1989) (false exculpatory statements may be probative of defendant's knowledge that he was "caught up in a situation involving criminal activity," but they were not sufficient to show that defendant knew of the specific conspiracy charged by the government).

payments in question. The court drew on the conclusion that there was "no affirmative evidence whatsoever that these payments were for a legitimate purpose, such as repayment of a loan or payment for services rendered," later underscoring that "no evidence supporting such [alternative] reasons [for the payments] was presented to the jury." App. 75a. This posits a line of reasoning that the jury itself was forbidden to entertain – that the defendant failed to shoulder a burden of establishing his innocence. The Eleventh Circuit addressed and rejected precisely this argument in *United States v. Fernandez*, 892 F.2d 976, 986 n.9 (11th Cir. 1990):

> The dissent would shift the burden of proof to appellants to show that the meeting at Miguel's home concerned a lawful purpose. Appellants did not bear any such burden. Lawfulness of purpose is not an affirmative defense to conspiracy; rather, unlawfulness of purpose is an element of the crime. As the government failed to offer any evidence that an illegal agreement transpired at Miguel's home, appellants had no inference to rebut, and the government's remaining evidence had no inference to confirm.[11]

Defendant surely had the right to contest the government's failure to prove extortion of Carmine Ragucci and it seemingly violated that right to hold against him on appeal his failure to show any "legitimate" reason for the payments.

The court's remaining reason for upholding the verdict was the testimony by the intermediary Scollo that Ciccone was

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11. As this Court explained in *Patterson v. New York*, 432 U.S. 197, 215 (1977), the "State must prove every ingredient of an offense beyond a reasonable doubt, and . . . it may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense."

"pissed off" when payments were late. Without any evidence of the purpose of the payments, this merely underscores the dangerous breadth of the lower court's opinion. In our bustling commercial society, being "pissed off" at non-payment is too common a reaction, too vague, and too embracing of innocent behavior to constitute the defining characteristic of criminality. *Williams v. United States*, 458 U.S. 279, 290 (1982)(construing statute narrowly in part to avoid construction that "would render a wide range of conduct violative of federal law").

In the third installment of the *Scheidler* litigation, this Court held that the Hobbs Act is limited to extortion and robbery and declined to expand its application to acts of violence in general. *Scheidler v. National Organization for Women, Inc.*, 126 S. Ct. 1264 (2006). By the same token, the Court should take note of any transmogrification of the Hobbs Act into a federal, unexplained and suspicious property transfer statute. Such an overbroad construction of the Hobbs Act – to the effect that unexplained, late payments must indicate extortion — would transgress the obligations of sensible and strict construction of criminal statutes. *Scheidler*, 537 U.S. 408-09. With the court of appeals already advocating an amorphous definition of property, this Court should intervene.

III. The Court of Appeals Applied a Standard Rejected By this Court to the Interstate Commerce Element of the Money Laundering Counts.

In rejecting a challenge to the money laundering counts on the basis that the affect on interstate commerce was not proven, the court of appeals applied a standard that has been rejected by this Court. The Court relied upon *United States v. Goodwin*, 141 F.3d 394, 402 (2d Cir. 1997) and *United States v. Leslie*, 103 F.3d 1093, 1101-02 (2d Cir. 1997) for the proposition "that it is indeed permissible to consider the conduct that gave rise to the laundered funds" in evaluating whether the interstate

commerce requirement was met. App. 81a-82a. However, this Court in *United States v. Cabrales*, 524 U.S. 1, 7 (1998), concerning venue, held that the situs of the actual laundering activity and not the underlying criminal activity is the relevant consideration, reasoning that the money laundering statutes "interdict only the financial transactions . . . not the anterior criminal conduct that yielded the funds allegedly laundered." In contrast to the Second Circuit, other circuits recognize and emphasize that the underlying offense is separate from the money laundering offense. *See, e.g., United States v.* [redacted] 238 F.3d 530, 534-35 (4th Cir. 2001)(reversing [redacted] premised on underlying criminal activity and recognizing [redacted] circuit authority no longer valid after Cabrales); *United States v. Mankarious*, 151 F.3d 694, 705 (7th Cir. 1998); *United States v. LeBlanc*, 24 F.3d 340, 346 (1st Cir. 1994)(in respect to sentencing). Accordingly, the underlying activity itself should not be utilized to establish the interstate commerce element. The court of appeals' failure to apply the central principle of Cabrales to the interstate commerce issue, in contradistinction of the holdings of other courts of appeal warrants this Court's intervention.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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